IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MEMPHIS NATURAL GAS COMPANY,
A Corporation, Petitioner,
VS.
GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

No. 218

EXCISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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EXCISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This suit was brought by petitioner against respondent in the Chancery Court of Davidson County, Tennessee to recover excise taxes, interest and penalties aggregating $67,025.02 paid under protest for the tax-paying periods July 1, 1939 through July 1, 1942. The Chancery Court

denied recovery. The Supreme Court of Tennessee on February 5, 1944 ordered refund of penalties, but affirmed liability for excise taxes and interest. R. 227.

The statute here involved requires that all domestic and foreign corporations pay "annually an excise tax, in addition to all other taxes, equal to three and three-quarters per cent. (3¾%) of the net earnings for their next preceding fiscal or calendar year, from business done within the State." In the case of corporations doing business in Tennessee and elsewhere "the net earnings shall be apportioned as hereinafter set forth and the net earnings thus apportioned to Tennessee shall be deemed to be the earnings arising from business done within the State and shall be the measure of this tax."

Chapter 99, Tennessee Public Acts 1937, p. 375, as amended by Chapter 176, Acts of 1937, p. 683, Code Paragraph 1316.

We have no question about the fairness of the allocation formula used by respondent. If petitioner be liable for any excise taxes, the amount assessed is equitable.

Petitioner is a Delaware corporation with its general offices at Memphis, Tennessee, and is engaged solely in the maintenance and operation of an interstate natural gas transmission line transporting natural gas for sale and delivery at wholesale to distributing companies at various delivery points on the system.

The pipe line originates in Louisiana, passes through the southeast corner of Arkansas, crosses the Mississippi River into Mississippi and thence north into Tennessee, skirts Memphis and terminates at Jackson, Tennessee. Map, Ex. 1, R. 26.

Petitioner has compressing stations in Louisiana, Arkansas and Mississippi and numerous delivery points on its line where the gas is measured by a meter and the gas pressure reduced by a mechanical regulator before delivery to the distributing companies.

All deliveries in Tennessee are made to the distributing companies which are customers of petitioner. There are but two, the Memphis Light, Gas and Water Division, owned by the City of Memphis, and the West Tennessee Gas Company, a private corporation.

It is undisputed that petitioner, after transporting the gas from Louisiana into Tennessee, does absolutely nothing other than to deliver same to the distributing companies. Petitioner has no interest in the distributing companies or their earnings or their properties, and petitioner's sole interest and activity in Tennessee is the operation of its interstate pipeline and the maintenance of general offices in Memphis which are accessory to the interstate business. R. 42-47.

Petitioner's business and activities in Tennessee are solely of an interstate nature. The collection of these excise taxes, which are synonomous with privilege taxes, violates the Commerce Clause of the United States Constitution, Article I, Section 8, prohibiting the exaction of an excise or privilege tax for the right to engage exclusively in interstate commerce.

We are not here concerned with an income tax or principles of law relating to the extent to which income taxes may be exacted under the Commerce Clause. The

Tennessee Constitution prohibits all income taxes other than upon "income derived from stocks and bonds."

Article II, Section 8;
Evans v. McCabe, 164 Tenn. 672.

The Supreme Court of Tennessee has concluded that this court has recently authorized the collection of excise or privilege taxes from a foreign corporation engaged exclusively in interstate commerce. Petitioner admits there would be liability if petitioner were doing any intrastate business in Tennessee, but such is not the case. The Supreme Court of Tennessee did not find that petitioner is doing local or intrastate business, but affirmed the tax because recent decisions of this court are said to warrant this result.

II.

STATEMENT OF JURISDICTION

The statute believed to sustain jurisdiction is 28 USCA, Par. 344(b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had *** where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

The Federal questions sought to be reviewed were raised by the pleadings in the court of first instance. Paragraph IV of the complaint states in part:

> "(a) Complainant does no intrastate business in Tennessee and therefore has no net earnings which are subject to the excise tax.
>
> "(b) The State of Tennessee may not exact an excise or privilege tax of the complainant for the right to do an interstate business as such a tax violates Article I, Section 8, United States Constitution that 'The Congress shall have power to regulate commerce with foreign nations, and among the several States.' The enforcement of the tax against complainant also violates the Fourteenth Amendment, Section I of the United States Constitution:
>
> " 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'
>
> "Congress has not authorized the States to exact of corporations an excise or privilege tax for the right to do an interstate business. In addition, the enforcement of the tax against complainant violates the due process of law clause of the Federal Constitution as the imposition and enforcement of the tax against complainant results in the State of Tennessee collecting taxes from properties and business done beyond the boundaries of the State of Tennessee and not fairly attributable to the State of Tennessee."
>
> R. 3.

The Federal questions were raised in the Supreme Court of Tennessee by reference to the pleadings and assignments of error as shown by the opinion. R. 227.

February 5, 1944, opinion by Supreme Court of Tennessee. R. 227.

February 10, 1944, decree entered ordering refund to petitioner of penalties totaling $24,881.23. R. 235.

February 16, 1944, petition by respondent to have the court settle differences among counsel about the proper decree. R. 240. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

February 19, 1944, petition by Memphis Natural Gas Company for entry of decree in conformity with its interpretation of the Court's opinion. R. 236. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

March 4, 1944, the Supreme Court of Tennessee denied petitions to rehear and reconsider the decree theretofore entered and the judgment became final. R. 244.

May 29, 1944, order extending certiorari time to and including July 5, 1944. R. 281.

This petition for certiorari is being filed prior to July 5, 1944.

The Supreme Court of Tennessee has decided these Federal questions of substance in a way probably not in accord with applicable decisions of this court.

The Federal questions here involved seem to be identical with those in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C., Dec. 24, 1943) and in which this court granted certiorari on May 23, 1944.

III.

THE QUESTIONS PRESENTED

1.

Tennessee cannot exact an excise or privilege tax from a foreign corporation engaged solely in interstate commerce. It violates the Commerce Clause of the United States Constitution, Article I, Section 8.

2.

The fact that this excise tax is measured by net income allocated to Tennessee must not obscure the nature of the tax involved. This is an excise tax and may not be considered as an income tax because such an income tax is absolutely prohibited by the Constitution of Tennessee, Article II, Section 8.

3.

The maintenance of general offices in Tennessee by a foreign corporation engaged exclusively in interstate commerce does not change the rule that Tennessee cannot exact an excise or privilege tax from such business so engaged solely in interstate commerce as the maintenance of the general offices are a part of and accessory to interstate commerce.

4.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and sells it wholesale to distributing companies and to an industrial consumer which takes the gas from a distributing system owned and operated by a distributor.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In order for this excise tax to be collectible from the petitioner it must appear that petitioner is engaged in some intrastate business. If the foreign corporation be engaged in both kinds of business and the excise tax is apportioned to the business fairly attributable to the taxing State, it is then permissible, but an excise tax upon a foreign corporation engaged exclusively in interstate commerce seems to violate the Commerce Clause. This court has several times decided in the past that even though the foreign corporation so engaged exclusively in interstate commerce maintains general offices within the taxing State, it nevertheless cannot be held liable for excise and privilege taxes as they are prohibited by the Commerce Clause.

The decision of the Supreme Court of Tennessee is based squarely upon Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, involving petitioner's Tennessee excise tax liability for the years 1932 through 1935, but the decision is not applicable here because the facts there involved are totally dissimilar to those here involved. Liability in the said decision was adjudged because petitioner was, in those years, doing intrastate business in Memphis by virtue of being a partner of the Memphis Power & Light Company in the distribution of gas. The contract then in effect between petitioner and the Memphis Power & Light Company was construed by both the Supreme Court of Tennessee and this court to be a partnership engagement described as "a profit-sharing joint adventure in the distribution of gas" and that the two companies were "in

effect partners or joint enterprisers in the distribution and sale of gas to Tennessee consumers."

This court said:

> "* * * the taxpayer's net earnings under the contract were subject to local taxation."

Petitioner was therefore held liable for the excise taxes as it was engaged in those years in local or intrastate business.

The Memphis Power & Light Company sold on June 27, 1939 its distribution properties to the City of Memphis, was liquidated and the contract involved in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 was terminated as of said date. R. 135-143.

The taxes here involved are for the years subsequent to the termination of the contract with the Memphis Power & Light Company on June 27, 1939.

Since then petitioner has had no interest in or partnership arrangement with any distributing company, and its sole interest and activity in Tennessee is the ownership and operation of its interstate pipe line.

In a companion case involving gross receipts taxes but not here involved as the Supreme Court of Tennessee ordered a refund to petitioner, the trial court found that petitioner "derived no receipts from intrastate business in this State."

R. 221.

The Supreme Court of Tennessee affirmed on February 5, 1944.

Memphis Natural Gas Co. v. McCanless, (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841.

The Supreme Court of Tennessee reached its conclusion that petitioner is liable for excise taxes subsequent to June 27, 1939 by reference to dicta in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649:

> "In any case if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * is not prohibited by the Commerce Clause on which alone taxpayer relies."

We refer to this paragraph as dicta because the only question involved in the former appeal was whether or not petitioner was engaged in some intrastate business. The excise tax statute in effect in the years involved in the former appeal levied the tax against net earnings "arising from business done wholly within the State, excluding earnings arising from interstate commerce."

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

After having found that petitioner, in those years, was engaged in some intrastate business, this court made, at the conclusion of the opinion, the general observation set forth above. We respectfully submit that the former appeal did not involve questions of income taxation which are wholly different from the question of privilege tax liability of a foreign corporation engaged exclusively in interstate commerce.

The paragraph in question, quoted supra, was recognized and labeled as dictum in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C.).

The former appeal could not have involved income taxes as they are expressly prohibited by the Tennessee Constitution.

The Supreme Court of Tennessee concluded in the present appeal that it is bound by the dictum appearing in the opinion disposing of the former appeal. When speaking of the dictum the Supreme Court of Tennessee said in the present appeal:

> "From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax."
>
> R. 231.

But this court did not so rule. It ruled in the former appeal that petitioner was in those years engaged in intrastate business and therefore liable for the tax. Having thus decided the case, this court observed, when speaking generally of permissible taxation under the Commerce Clause, that a foreign corporation engaged solely in interstate commerce and having a commercial domicile within the taxing State can be held liable for a non-discriminatory income tax upon its net income attributable to activities within the taxing State.

This principle can have no application here because the plain mandate of the Constitution of Tennessee absolutely prohibits income taxes. This excise or privilege tax certainly cannot be justified by applying to it principles of income taxation without violating the express mandate of the Tennessee Constitution. Our question is whether or not a foreign corporation with its general offices in Tennessee and engaged exclusively in interstate commerce can be held for excise or privilege taxes.

There can be no doubt about the fact that this court has several times in the past decided that this cannot be

done. Likewise there cannot be any doubt that this court has not down to the present time ruled that it may be done, and there is nothing in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 authorizing such a result.

Petitioner respectfully submits that the decision of the Supreme Court of Tennessee is in direct conflict with Ozark Pipe Line Co. v. Monier, 266 U. S. 555, where a Maryland corporation qualified for business in Missouri, operated a pipe line from Oklahoma through Missouri to Illinois, maintained in Missouri two general offices and was held not liable for the Missouri franchise tax imposed upon all corporations. The same conclusion was reached in Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, involving an excise tax. There are many other cases to the same effect.

Petitioner respectfully submits that the Supreme Court of Tennessee has decided this Federal question of substance in a way probably not in accord with applicable decisions of this court.

The Supreme Court of Tennessee pretermitted the question of whether or not petitioner is engaged exclusively in interstate commerce and stated:

> "We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra."

It concluded that the dictum in Memphis Natural Gas Co. v. Beeler, makes petitioner liable for the excise taxes whether or not exclusively engaged in interstate commerce. This seems fallacious for the reasons heretofore pointed out.

There can be no doubt that a pipe line company such as petitioner is engaged exclusively in interstate commerce as this proposition has been settled many times by this court and as recently as in Illinois Gas Co. v. Public Service Co., 314 U. S. 498.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

> See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line. Also R. 44, 56.

It seems unnecessary to argue the proposition that this does not constitute intrastate business. It has been expressly so decided in Illinois Gas Co. v. Public Service Co., 314 U. S. 498 and also in Memphis Natural Gas Co. v. McCanless (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841, decided February 5, 1944, which is a companion suit but not here involved as the Supreme

Court of Tennessee ordered the gross receipts taxes refunded to petitioner.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Tennessee commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Tennessee be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MEMPHIS NATURAL GAS COMPANY, Petitioner

By

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IN THE

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MEMPHIS NATURAL GAS COMPANY,
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VS.
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Respondent.

No. 219

FRANCHISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Respondent.

No. .....

FRANCHISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This suit was brought by petitioner against respondent in the Chancery Court of Davidson County, Tennessee to recover franchise taxes, interest and penalties aggregating $22,154.22 paid under protest for the tax-paying periods July 1, 1939 through July 1, 1942. The Chancery Court denied recovery. The Supreme Court of Tennessee,

on February 5, 1944, ordered a refund of penalties, but affirmed liability for franchise taxes and interest. R268.

The statute here involved is:

> "Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That all corporations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in Section 2 hereof, pay to the Commissioner of Finance and Taxation annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this State and shall be in addition to all other taxes levied by any other Act.
>
> * * * *
>
> "The privilege tax hereby imposed shall be a tax of fifteen (15c) cents on the One Hundred ($100.00) Dollars, or major fraction thereof, of the issued and outstanding stock, surplus and undivided profits of each such corporation as shown by the books and records of such corporation at the close of its last calendar or fiscal year preceding the making of the sworn report hereinafter required."
>
> Chapter 100, Tennessee Public Acts 1937, p. 379, Code 1248.143.

A subsequent section of the franchise statute sets forth the measure of the tax as provided in an allocation formula. We have no question about the fairness of the allocation formula used by respondent. If petitioner be liable for any franchise taxes, the amount assessed is equitable.

Petitioner is a Delaware corporation with it general offices at Memphis, Tennessee and is engaged solely in the maintenance and operation of an interstate natural gas transmission line transporting natural gas for sale and delivery at wholesale to distributing companies at various delivery points on the system.

The pipe line originates in Louisiana, passes through the southeast corner of Arkansas, crosses the Mississippi River into Mississippi and thence north into Tennessee, skirts Memphis and terminates at Jackson, Tennessee. Map Ex. 1, R. 26.

Petitioner has compressing stations in Louisiana, Arkansas and Mississippi and numerous delivery points on its line where the gas is measured by a meter and the gas pressure reduced by a mechanical regulator before delivery to the distributing companies.

All deliveries in Tennessee are made to the distributing companies which are customers of petitioner. There are but two, the Memphis Light, Gas & Water Division, owned by the City of Memphis, and the West Tennessee Gas Company, a private corporation.

It is undisputed that petitioner, after transporting the gas from Louisiana into Tennessee, does absolutely nothing other than to deliver same to the distributing companies. Petitioner has no interest in the distributing companies or their earnings or their properties, and petitioner's sole interest and activity in Tennessee is the operation of its interstate pipe line and the maintenance of general offices in Memphis which are accessory to the interstate business. R. 42-47.

Petitioner's business and activities in Tennessee are solely of an interstate nature. The collection of these franchise taxes violates the Commerce Clause of the United States Constitution, Article I, Section 8, prohibiting the exaction of a franchise or privilege tax for the right to engage exclusively in interstate commerce.

The Supreme Court of Tennessee has concluded that this court has recently authorized the collection of franchise taxes from a foreign corporation engaged exclusively in interstate commerce. Petitioner admits there would be liability if petitioner were doing any intrastate business in Tennessee, but such is not the case. The Supreme Court of Tennessee did not find that petitioner is doing local or intrastate business, but affirmed the tax because recent decisions of this court are said to warrant this result.

II.

STATEMENT OF JURISDICTION

The statute believed to sustain jurisdiction is 28 USCA, Par. 344(b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had *** where any title, right, privilege or immunity if specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

The Federal questions sought to be reviewed were raised by the pleadings in the court of first instance.

Paragraph IV of the complaint states in part:

> "(a) Complainant has done no intrastate business in Tennessee since said date, and the plain legislative intent requires the payment of the franchise tax by a foreign corporation only if 'doing business in Tennessee', which means intrastate business.
>
> "(b) The State of Tennessee may not exact a franchise tax, which is the equivalent of a privilege tax, of the complainant for the right to do an interstate business as such a tax violates Article I, Section 8, United States Constitution that 'The Congress shall have power to regulate commerce with foreign nations, and among the several States.' The enforcement of the tax against complainant also violates the Fourteenth Amendment, Section I of the United States Constitution 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' Congress has not authorized the States to exact of corporations a franchise or privilege tax for the right to do an interstate business. In addition, the enforcement of the tax against complainant violates the due process of law clause of the Federal Constitution as the imposition and enforcement of the tax against complainant results in the State of Tennessee collecting taxes from properties and business beyond the boundaries of the State of Tennessee and not fairly attributable to the State of Tennessee."
>
> R. 250, 251.

The Federal questions were raised in the Supreme Court of Tennessee by reference to the pleadings and assignments of error as shown by the opinion. R. 268.

February 5, 1944, opinion by the Supreme Court of Tennessee. R. 268.

February 10, 1944, decree entered ordering refund to petitioner of penalties totaling $4,169.04. R. 267.

February 16, 1944, petition by respondent to have the court settle differences among counsel about the proper decree. R. 269. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886).

February 19, 1944, petition by Memphis Natural Gas Company for entry of decree in conformity with its interpretation of the court's opinion. R. 273. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

March 4, 1944, the Supreme Court of Tennessee denied petitions to rehear and reconsider the decree theretofore entered and the judgment became final. R. 277.

May 29, 1944, order extending certiorari time to and including July 5, 1944. R. 281.

This petition for certiorari is being filed prior to July 5, 1944.

The Supreme Court of Tennessee has decided these Federal questions of substance in a way probably not in accord with applicable decisions of this court.

The Federal questions here involved seem to be identical with those in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C., Dec. 24, 1943) and in which this court granted certiorari on May 23, 1944.

III.

THE QUESTIONS PRESENTED

1.

Tennessee cannot exact a franchise tax from a foreign corporation engaged solely in interstate commerce. It violates the Commerce Clause of the United States Constitution, Article I, Section 8.

2.

The maintenance of general offices in Tennessee by a foreign corporation engaged exclusively in interstate commerce does not change the rule that Tennessee cannot exact a franchise tax from such business so engaged solely in interstate commerce as the maintenance of the general offices are a part of and accessory to interstate commerce.

3.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and sells it wholesale to distributing companies and to an industrial consumer which takes the gas from a distributing system owned and operated by a distributor.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In order for this franchise tax to be collectible from the petitioner it must appear that petitioner is engaged in some intrastate business. If the foreign corporation be engaged in both kinds of business and the franchise tax is apportioned to the business fairly attributable to the taxing State, it is then permissible, but a franchise tax

upon a foreign corporation engaged exclusively in interstate commerce seems to violate the Commerce Clause. This court has several times decided in the past that even though the foreign corporation so engaged exclusively in interstate commerce maintains general offices within the taxing State, it nevertheless cannot be held liable for franchise taxes as such a result is violative of the Commerce Clause.

The decision of the Supreme Court of Tennessee affirming liability is based squarely upon Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 involving petitioner's Tennessee excise tax liability for the years 1932 through 1935, but the decision is not applicable here because the facts there involved are totally dissimilar to those here involved. The excise tax is a privilege tax and likewise the franchise tax is also a privilege tax. The Supreme Court of Tennessee concluded that since petitioner was held liable for excise taxes in Memphis Natural Gas Co. v. Beeler, supra, for the years 1932 through 1935, it must be liable for franchise taxes.

Liability in said decision of Memphis Natural Gas Co. v. Beeler, supra, was adjudged because petitioner was, in those years, doing intrastate business in Memphis by virtue of being a partner of the Memphis Power & Light Company in the distribution of gas. The contract then in affect between petitioner and the Memphis Power & Light Company was construed by both the Supreme Court of Tennessee and this court to be a partnership engagement described as "a profit-sharing joint adventure in the distribution of gas" and that the two companies were "in effect partners or joint enterprisers in the distribution and sale of gas to Tennessee consumers."

This court said:

> "* * * the taxpayer's net earnings under the contract were subject to local taxation."

Petitioner was therefore held liable for the excise taxes as it was engaged in those years in local or intrastate business. But petitioner discontinued that intrastate business on June 27, 1939.

The Memphis Power & Light Company sold on June 27, 1939 its distribution properties to the City of Memphis, was liquidated and the contract involved in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 was terminated as of said date. R. 135-143.

The franchise taxes here involved are for the years subsequent to the termination of the contract with the Memphis Power & Light Company on June 27, 1939. Petitioner voluntarily paid the franchise taxes due prior to July 1, 1939 as it was engaged during those years in intrastate business, but has paid under protest the franchise taxes due July 1, 1939 and subsequently.

Since said date of June 27, 1939 petitioner has had no interest in or partnership arrangement with any distributing company, and its sole interest and activity in Tennessee is the ownership and operation of its interstate pipe line.

The Supreme Court of Tennessee reached its conclusion that petitioner is liable for franchise taxes subsequent to June 27, 1939 by reference to dicta in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649:

> "In any case if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * is not prohibited by the Commerce Clause on which alone taxpayer relies."

We refer to this paragraph as dicta because the only question involved in the former appeal was whether or not petitioner was engaged in some intrastate business. The excise tax statute in effect in the years involved in the former appeal levied the tax against net earnings "arising from business done wholly within the State, excluding earnings arising from interstate commerce."

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

After having found that petitioner, in those years, was engaged in some intrastate business, this court made, at the conclusion of the opinion, the general observation set forth above. We respectfully submit that the former appeal did not involve questions of income taxation which are wholly different from the question of franchise tax liability of a foreign corporation engaged exclusively in interstate commerce.

The paragraph in question, quoted supra, was recognized and labeled as dictum in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C.).

The former appeal could not have involved income taxes as they are expressly prohibited by the Tennessee Constitution.

Obviously, the dictum dealing with income taxes can have no relevancy to the franchise taxes here involved.

The Supreme Court of Tennessee concluded in this franchise tax suit that the dictum relating to principles of income taxation is so strong and comprehensive that petitioner is also liable for franchise taxes. Such reasoning seems unsound as income taxes and franchise taxes are basically different. Petitioner conceded in the Supreme Court of Tennessee that it is liable for these franchise taxes if it be found that petitioner has been engaged in intrastate business since June 27, 1939, but the court did not so find. It simply concluded that petitioner is liable for franchise taxes because of its decision in the companion appeal that petitioner is liable for excise taxes and predicated its decision upon the dictum in Memphis Natural Gas Co. v. Beeler, supra. When speaking of the dictum, the Supreme Court of Tennessee said in the present companion excise tax suit opinion:

> "From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax."
>
> R. 231.

Whatever may be said about the dictum, it has no relationship to or influence upon this question of franchise taxes.

In Memphis Natural Gas Company v. Beeler, 315 U. S. 649, this court held that from 1932 to 1935 petitioner was engaged in intrastate business in Tennessee and therefore liable for the excise taxes. Having thus decided the case the court observed, when speaking generally of permissible taxation under the Commerce Clause, that a foreign corporation, engaged exclusively in interstate commerce

and having a commercial domicile within the taxing State, can be held liable for a non-discriminatory income tax upon net income attributable to activities within the taxing State.

This franchise tax certainly cannot be justified by applying to it principles of income taxation. Our question is whether or not a foreign corporation with its general offices in Tennessee and engaged exclusively in interstate commerce can be held liable for franchise taxes.

This court has many times in the past decided that this cannot be done. There is nothing in Memphis Natural Gas Co. v. Beeler, supra, authorizing such a result.

Petitioner respectfully submits that the decision of the Supreme Court of Tennessee is in direct conflict with Ozark Pipe Line Co. v. Monier, 266 U. S. 555, where a Maryland corporation qualified for business in Missouri, operated a pipe line from Oklahoma through Missouri to Illinois, maintained in Missouri two general offices and was held not liable for the Missouri franchise tax imposed on corporations. The same conclusion was reached in Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, involving an excise tax. There are many other cases to the same effect.

Petitioner respectfully submits that the Supreme Court of Tennessee has decided this Federal question of substance in a way probably not in accord with applicable decisions of this court.

The Supreme Court of Tennessee pretermitted the question of whether or not petitioner is engaged exclusively in interstate commerce and stated in the companion excise tax opinion:

"We do not find it necessary to pass on this con-

> troversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra."

It concluded that the dictum in Memphis Natural Gas Co. v. Beeler makes petitioner liable not only for the excise taxes in the companion appeal, but also liable for these franchise taxes whether or not petitioner be engaged exclusively in interstate commerce. This seems fallacious for the reasons heretofore pointed out.

There can be no doubt that a pipe line company such as petitioner is engaged exclusively in interstate commerce as this proposition has been settled many times by this court and as recently as in Illinois Gas Co. v. Public Service Co., 314 U. S. 498.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line system and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

> See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line. Also R. 44, 56.

It seems unnecessary to argue the proposition that this does not constitute intrastate business. It has been expressly so decided in Illinois Gas Co. v. Public Service Co., 314 U. S. 498 and also in Memphis Natural Gas Co. v. McCanless (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841, decided February 5, 1944, which is a companion suit but not here involved as the Supreme Court of Tennessee ordered the gross receipts taxes refunded to petitioner.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Tennessee commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Tennessee be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MEMPHIS NATURAL GAS COMPANY, Petitioner

By

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Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 218

MEMPHIS NATURAL GAS COMPANY, Petitioner,

VS.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee, Respondent.

EXCISE TAX CASE

No. 219

MEMPHIS NATURAL GAS COMPANY, Petitioner,

VS.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee, Respondent.

FRANCHISE TAX CASE

BRIEF OF PETITIONER IN SUPPORT OF ITS PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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VS.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

EXCISE TAX CASE

No.....

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Respondent.

FRANCHISE TAX CASE

BRIEF OF PETITIONER IN SUPPORT OF ITS PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

For the convenience of the court and to avoid unnecessary repetition, the petitioner, Memphis Natural Gas

Company, is filing but one brief in support of its two petitions for writs of certiorari to the Supreme Court of Tennessee. Two different suits are involved. One involves Tennessee excise taxes, while the other involves Tennessee franchise taxes. The law and arguments supporting the certiorari petition in the excise tax case are in great measure also applicable to the franchise tax case and therefore only one brief is filed.

POINTS AND AUTHORITIES RELIED ON

I.

A foreign corporation maintaining general offices in Memphis, Tennessee and engaged solely in interstate commerce cannot be held liable for excise and franchise taxes.

Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203;
Anglo-Chilean Corp. v. Ala., 288 U. S. 218;
Atlantic Lumber Co., v. Commissioner, 298 U. S. 553;
Crutcher v. Kentucky, 141 U. S. 47;
Federal Coal Co. v. U. S. Fuel Corp., 147 Tenn. 212;
Matson Navigation Co. v. State Board, 297 U. S. 441;
Murdock v. Pennsylvania, ... U. S. .....;
Nelson v. Sears, Roebuck & Co., 312 U. S. 369;
Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;
Southern Pac. R. R. v. Gallagher, 306 U. S. 167.

II.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and delivers it wholesale to distributing companies.

East Ohio Gas Co v. Tax Commission, 283 U. S. 465;
Federal Power Commission v. Natural Gas Pipe Line Co., 315 U. S. 575;

Illinois Gas Co. v. Public Service Co., 314 U. S. 498;
Memphis Natural Gas Co. v. McCanless, ... Tenn. ....., 177 S. W. (2) 841 (Gross Receipts Tax Case);
Missouri v. Kansas Gas Co., 265 U. S. 298;
Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;
Public Utilities Commission v. Landon, 249 U. S. 239;
State Tax Commission v. Gas Co., 284 U. S. 41.

EXCISE TAX CASE

The principal question involved is whether or not the Memphis Natural Gas Company, a Delaware corporation, maintaining general offices in Memphis, Tennessee and engaged solely in interstate commerce, can be held liable for Tennessee excise taxes.

Admittedly this excise tax statute quoted in the certiorari petition is a privilege tax.

Manufacturing Corporation v. Graham, 161 Tenn. 46;
Memphis Dock & Forwarding Co. v. Fort, 170 Tenn. 109.

We are not here concerned with principles relating to permissible income taxes under the Commerce Clause of the Federal Constitution because the Tennessee Constitution expressly prohibits income taxes except "upon incomes derived from stocks and bonds that are not taxed ad valorem."

Tennessee Constitution, Article II, Section 8;
Evans v. McCabe, 164 Tenn. 672.

The fact that the excise tax is measured by net income attributable to activities in Tennessee does not change the basic fact that this is a privilege tax.

As stated in McLeod, Commissioner v. J. E. Dilworth Co., ...U. S.....,. May 15, 1944:

> "Thus we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution.' "

Likewise it is improper to render valid a privilege tax statute by viewing it as an income tax statute simply because the measure of the privilege tax is determined by net income attributable to the taxing State.

All of petitioner's business in Tennessee for the years here involved is solely interstate commerce. It is true that petitioner is a Delaware corporation with its general offices in Memphis, Tennessee, but this does not make it liable for excise taxes so long as petitioner refrains from intrastate business.

This question has been before this court many times. There are cases directly in point supporting petitioner's position.

It will serve no good purpose to deal with these authorities at length, and we therefore briefly comment upon them.

Some of the cases directly in point are:

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555:

The pipe line company was a Maryland corporation qualified for business in Missouri. It operated a pipe line from Oklahoma through Missouri and into Illinois. It maintained in Missouri two general offices and there did

all acts similar to those done by petitioner in its Memphis office.

Missouri imposed a franchise tax upon all corporations. This court emphatically held that since the pipe line company was engaged in Missouri in nothing but interstate commerce, it could not be held liable for the franchise tax even though it had two general offices, or in present day language, a commercial domicile, in Missouri.

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property, itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected. Heyman v. Hays, supra, page 186 (35 S. Ct. 403)."

It is quite impossible for a litigant to find a case more squarely in point than the above decision. It has recently been cited with approval by this court.

Southern Pacific R. R. v. Gallagher, 306 U. S. 167:

On Page 179 the court said when speaking of Ozark Pipe Line Corporation v. Monier:

> "The tax was forbidden because on the privilege of doing an exclusively interstate business."

On Page 180 the court said:

> "The language just quoted shows that this court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference therewith because a tax directly upon it. '* * * nothing was done in Missouri except in furtherance of transportation'. It was this conclusion of the court on the factual situation which brought about the Ozark decision. **Where there is also intrastate activity, an apportioned State franchise tax on foreign corporations doing an interstate business is upheld.** Southern Natural Gas Corp. v. Ala., 301 U. S. 148, 155. **A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid.** Atlantic Lumber Co. v. Commissioner, 298 U. S. 553, 556."

Professor Thomas Reed Powell, Professor of Constitutional Law in the Harvard Law School, stated in the Harvard Law Review, Vol. 53, page 909, April, 1940:

> "Excises on doing business in corporate form, measured in ways permissible if **both** local and interstate commerce are conducted, have been uniformly condemned when the business is exclusively interstate."

Crutcher v. Kentucky, 141 U. S. 47, 57:

> "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *."

Murdock v. Pennsylvania, U. S. , May 3, 1943:

This court said:

> "A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

> **Thus it may not exact a license tax for the privilege of carrying on interstate commerce** (McGoldrick v. Berwind-White Co., 309 U. S. 33, 56-58), although it **may tax the property used in, or the income derived from,** that commerce, so long as those taxes are not discriminatory."

Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203:

Massachusetts levied an excise tax in almost the exact language of the Tennessee statute.

The taxpayer was incorporated in New Jersey, but it maintained an office in Boston "in charge of a District Sales Manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipment of goods for the New England States are conducted." It was admitted that the taxpayer was engaged exclusively in interstate commerce.

The court said:

> "The right to lay taxes on taxable property or **on income** is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of those factors—the proportion of the value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?
>
> "Cheney Bros. Co. v. Mass. 246 U. S. 147, 153, 154, **necessitates a negative reply.** Under St. 1909, c. 490, Part III, Par. 56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the

present cause. This court said: 'We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause'. Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is there invalid **without regard to measure or amount.** Looney v. Crane, 245 U. S. 178, 190; International Paper Co., v. Mass., 246 U. S. 135, 142; Heisler v. Thomas Colliery Co., 260 U. S. 245, 249; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150."

Matson Navigation Co. v. State Board, 297 U. S. 441:

This case involved franchise taxes and this court said:

> **"A foreign corporation whose sole business in California is foreign and interstate commerce cannot be subjected to the tax in question.** Alpha Cement Co. v. Massachusetts, 268 U. S. 203; Anglo-Chilean Nitrate Co. v. Alabama, 288 U. S. 218."

Nelson v. Sears, Roebuck & Co., 312 U. S. 369:

> "Thus Iowa may not lawfully license or regulate the business of agents soliciting orders to be shipped in interstate commerce; or limit or condition the right to enforce mail order contracts in Iowa courts. The power to exclude foreign corporations altogether from doing a local business does not enable the State to impose burdens upon the transaction of interstate commerce by a foreign corporation **registered** in the state; and **registration** by a foreign corporation in order to do business within the State does not constitute a waiver of the corporation's right to transact interstate business free from the burdens of state regulation or taxation."

The Supreme Court of Tennessee has announced the above principles of law and followed them until its decision herein, which is accounted for by the dictum in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

Federal Coal Co. v. U. S. Fuel Corporation, 147 Tenn. 212:

> "Although plaintiff in error had its principal office in Tennessee, with all its organization, and was here doing business, still, if all this business had been interstate in character, the plaintiff in error would not have been liable to any privilege tax. Heyman v. Hay, 236 U. S. 178."

Atlantic Lumber Co. v. Commissioner, 298 U. S. 553:

Massachusetts imposed an excise tax similar to the Tennessee excise tax for the privilege of carrying on business within the State. The taxpayer was organized under the laws of Delaware and maintained its principal office in Boston. This court found that the taxpayer was engaged in some intrastate business and therefore held it liable for the tax, but this court stated:

> "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution (citing several cases), but such is not the case."

Anglo-Chilean Corporation v. Alabama, 288 U. S. 218:

This was a New York corporation with its principal office in that State, but it qualified to do business in Alabama by filing the usual papers and there maintained important offices.

Alabama imposed a franchise tax. The taxpayer was engaged solely in interstate commerce in Alabama.

This court said:

> "The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax."

The court further said when speaking of the Ozark Pipe Line case, supra:

> "We held that the tax could not be constitutionally exacted, and that the fact that the foreign corporation was organized for local business and had applied for and received a local license conferring the power of eminent domain did not enable the state to tax its right to carry on interstate commerce."

The foregoing cases appear to conclusively sustain the proposition that petitioner cannot be held liable for the Tennessee excise taxes as it is engaged in Tennessee solely in interstate commerce, and this result is not changed by the fact that it has general offices in Tennessee.

It appears that the Supreme Court of Tennessee has decided this ~~franchise~~ excise tax question in a manner inconsistent with the applicable decisions of this court.

There is one remaining point for discussion.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from

the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

> See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line;
> Also R. 44, 56.

The above described arrangement does not constitute intrastate business. This court has recently decided that it is interstate business.

Illinois Gas Co. v. Public Service Co., 314 U. S. 498:

The Illinois Commerce Commission ordered the Illinois Natural Gas Company to construct certain additional pipe lines and otherwise undertook to exercise jurisdiction over the pipe line, which was resisted. Mr. Chief Justice Stone stated that the transmission line was beyond the jurisdiction of the State Commission.

When stating the facts, he pointed out that the pipe line company sold and delivered large quantities of gas to distributing companies.

> "It also sells and delivers gas to several industrial consumers in the State."
> "After the reduction of pressure the gas continues to move in appellant's lines until it passes into the service pipes of the local distributors, or industrial users, where the pressure is again substantially reduced."

This court laid down the positive rule that sales to an industrial consumer are interstate where the industrial consumer constructs its own line to connect with the transmission line and takes the gas at the point of connection. This completely destroys the fallacious argument made by the respondent to the effect that the sales by the petitioner to the Memphis Generating Company are intrastate sales.

The Supreme Court of Tennessee decided the question against respondent in the companion gross receipts tax case.

Memphis Natural Gas Co. v. McCanless, ... Tenn. .....,
177 S. W. (2) 841, decided February 5, 1944:

The court said:

> "It should be mentioned that in addition to its sales to the City of Memphis and to West Tennessee Light and Power Company the complainant also has a contract by which it sells gas to Memphis Generating Company, that concern using it for fuel. However, the complainant does not undertake to deliver that gas at the plant of the Memphis Generating Company but by an arrangement between the Generating Company and the City of Memphis the City's pipes take the gas from complainant's pipes over to the place of business of the Generating Company. Instead of building its own service pipe to connect with complainant's line the Generating Company procures the City of Memphis to render this service through its service pipes. The complainant has nothing to do with this delivery and herein the case differs from Southern Natural Gas Corp. v. Alabama, 301 U. S. 148, 57 S. Ct. 696, 81 L. Ed. 970, relied on by the commissioner."

Other cases reaching the same conclusion are:

Federal Power Commission v. Natural Gas Pipe Line Co., 315 U. S. 575;
State Tax Commission v. Gas Co., 284 U. S. 41;
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;
Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;
Missouri v. Kansas Gas Co., 265 U. S. 298;
Public Utilities Commission v. Landon, 249 U. S. 239.

FRANCHISE TAX CASE

The franchise tax involved is for the privilege of engaging in business in corporate form in Tennessee.

The arguments and authorities made supra in connection with the excise tax are applicable to the question of franchise tax liability.

We do not want to unduly burden the court by repetition thereof. Our question is whether or not this foreign corporation with general offices in Tennessee and doing solely interstate business in Tennessee can be held liable for this privilege tax.

The three companion suits involving gross receipts taxes, excise taxes and franchise taxes were tried on a common record and the Supreme Court of Tennessee handed down its written opinions in all three cases on February 5, 1944. To understand the conclusions and views of the Supreme Court of Tennessee about any one of the three suits it is necessary to read the opinions in the three suits though the gross receipts tax case is not here involved as those taxes were ordered refunded to petitioner.

The Supreme Court of Tennessee predicated petitioner's liability for excise and franchise taxes upon the dictum appearing in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 as pointed out in the certiorari petitions. For the reasons discussed therein petitioner respectfully submits that this was error and the conclusions of the Supreme Court of Tennessee in direct conflict with applicable decisions of this court.

Respectfully submitted,

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(27)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 218

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

Excise Tax Case.

No. 219

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

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Respondent.

Franchise Tax Case.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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Roy H. Beeler,
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Of Counsel.

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Respondent.

Franchise Tax Case.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

May it please the Court:

Pursuant to the rules of the Supreme Court of the United States, Rule 7, Section 3, the respondent, George F. McCanless, Commissioner of Finance and Taxation of the

State of Tennessee, submits the following statement and brief in opposition to the jurisdiction of the Court to grant the writs of certiorari prayed for in this cause by the petitioner, Memphis Natural Gas Company.

I.

The Issues Raised by the Petitions Have Heretofore Been Fully Briefed and Argued Before This Court and Decided in Memphis Natural Gas Company v. Beeler, 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090.

It is the position and contention of the respondent, the State of Tennessee, that the petitions for writs of certiorari filed by the Memphis Natural Gas Company in the above entitled causes should be denied upon authority of *Memphis Natural Gas Company* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090.

In support of respondent's contention, these same litigants, namely, the Memphis Natural Gas Company and the State of Tennessee, were heretofore before this Court in *Memphis Natural Gas Company* v. *Beeler, supra.* All of the issues raised by the pending petitions for certiorari were elaborately briefed and fully argued, and on March 30, 1942, this Court decided the case adversely to the claims of the Memphis Natural Gas Company. It is insisted that these petitions for writs of certiorari are in effect nothing more or less than an effort to re-try the previous case.

It will be noted from that opinion that the Memphis Natural Gas Company was claiming immunity from taxation under the Tennessee excise tax statute (Williams Code of Tennessee, Sec. 1316) and it was insisted by the corporation that the tax was a burden upon interstate commerce.

The crux of the present litigation is the proper and correct interpretation of the opinion of this Court in *Memphis Natural Gas Company* v. *Beeler, supra.*

In that case, as in the instant case, the petitioner relied upon the commerce clause. The Supreme Court of Tennessee held (*Memphis Natural Gas Co.* v. *Pope,* 178 Tenn. 580, 161 S. W. 2d. 211) that the taxpayer was engaged in intrastate commerce by reason of a joint enterprise contract which it had with a local Tennessee corporation, under which the two corporations were engaged in the business of distributing the gas locally and divided the profits derived therefrom.

The Supreme Court of the United States affirmed the decision of the Supreme Court of Tennessee in Memphis Natural Gas Company v. Beeler *upon two grounds:* (1) Upon the ground of engaging in intrastate commerce by virtue of a joint enterprise contract to do business and share profits with a Tennessee corporation engaged in local business; (2) *upon the second ground that the Memphis Natural Gas Company maintained its commercial domicile in Tennessee and was liable for a nondiscriminatory tax upon its net income upon earnings justly attributable to Tennessee.*

The point of difference between petitioner and respondent is that petitioner asserts that the second ground upon which this Court sustained the Supreme Court of Tennessee in *Memphis Natural Gas Company* v. *Beeler, supra,* is mere dictum and is not entitled to the respect accorded judicial decision.

Counsel for the State of Tennessee respectfully insists that the second ground upon which this Court rested its decision arose in the course of the previous litigation, was elaborately briefed and fully argued before this Court, and was equally as determinative of the lawsuit as the first ground discussed in the opinion and the one upon which the Supreme Court of Tennessee primarily based its decision.

In next to the concluding paragraph of the opinion in *Memphis Natural Gas Company* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090-1097, this Court decided a question of law which arose in the case which had been briefed and argued before the Court and which was determinative of the case. The respondent insists that the following language constituting the second ground of this Court's holding is determinative of the pending petitions for writs of certiorari:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. Wheeling Steel Corp. v. Fox, 298 US 193, 80 L ed 1143, 56 S Ct 773, supra, or upon net income derived from within the state, Shaffer v. Carter, 252 US 37, 57, 64 L ed 445, 458, 40 S Ct 221; Wisconsin v. Minnesota Min. & Mfg. Co. 311 US 452, 85 L ed 274, 61 S Ct 253; cf. New York ex rel. Cohn v. Graves, 300 US 308, 81 L ed 666, 57 S Ct 466, 108 ALR 721, is not prohibited by the commerce clause on which alone taxpayer relies. United States Glue Co. v. Oak Creek, 247 US 321, 62 L ed 1135, 38 S Ct 499, Ann Cas 1918E 748; Underwood Typewriter Co. v. Chamberlain, 254 US 113, 119, 120, 65 L ed 165, 168, 169, 41 S Ct 45; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 69 L ed 282, 45 S Ct 82; Western Live Stock v. Bureau of Revenue, 303 US 250, 255, 82 L ed 823, 827, 58 S Ct 546, 115 ALR 944. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. Underwood Typewriter Co. v. Chamberlain, 254 US 113, 65 L ed 165, 41 S Ct 45, supra; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 69 L ed 282, 45 S Ct 82, supra; Butler Bros v. McColgan, 315 US 501, ante, 991, 62 S Ct. 701. It does not appear that upon any theory the tax can be deemed to infringe the commerce clause."
>
> *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. ed. 1090-1097.

Subsequent to the decision of the Supreme Court of the United States in *Memphis Natural Gas Company* v. *Beeler, supra,* the State of Tennessee, relying upon said decision, collected certain excise and franchise taxes from the corporation after the joint enterprise contract which constituted the first ground to this Court's decision had expired. The State of Tennesse necessarily relied upon the second ground of this Court's decision as above set forth and quoted. The petitioner brought suit against the respondent to recover the taxes which had been paid under protest upon the theory that the second ground of this Court's decision was merely dictum and was not to be accorded the dignity of judicial decision.

Both the Chancery Court of Davidson County, Tennessee, and the Supreme Court of Tennessee held against the corporation in the instant case, *Memphis Natural Gas Company* v. *McCanless* (excise tax case), 180 Tenn. —, 177 S. W. 2d. 843. On page 846 of 177 S. W. 2d. the Supreme Court of Tennessee said with reference to its interpretation of the opinion of the Supreme Court of the United States in *Memphis Natural Gas Company* v. *Beeler, supra*:

> "There is still quite a controversy between the complainant and the commissioner as to whether any portion of the complainant's business in Tennessee is of a local or intrastate character. We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra. In that case, in this Court and in the Supreme Court, the argument for complainant was that no part of its business was local in character. That the relation between it and Memphis Power and Light Company was only that of seller and buyer. That there was nothing like a joint enterprise in the distribution of gas. The principal ground of the decision in this Court was that a joint enterprise in distribution did

exist. On this question the Supreme Court expressed itself thus (315 U. S. 649, 62 S. Ct. 861, 86 L. Ed. 1090): 'We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses.'

"Waiving this point, however, and passing to complainant's contention that all its business was interstate, the Supreme Court expressed itself thus: 'In any case even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. Wheeling Steel Corp. v. Fox (298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143), supra, or upon net income derived from within the state, Shaffer v. Carter, 252 U. S. 37, 57, 40 S. St. 221, 227, 64 L. Ed. 445 (458); (State of) Wisconsin v. Minnesota Min. & Mfg. Co., 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; cf. People of State of New York ex rel. Cohn v. Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666, 108 A. L. R. 721, is not prohibited by the commerce clause on which alone taxpayer relies. United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119 (120), 41 S. Ct. 45, 65 L. Ed. 165, 168, 169; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255, 58 S. Ct. 546, 82 L. Ed. 823 (827), 115 A. L. R. 944. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. Underwood Typewriter Co. v. Chamberlain (254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165), supra; cf. Bass, Ratcliff & Gretton v. State Tax Commission (266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282), supra; Butler

Bros. v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. (991). It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.'

"From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax. In other words, treating the imposition as reaching earnings from interstate commerce, nevertheless the tax was valid.

"The complainant insists that the language of the Supreme Court last quoted was obiter dicta. To this we cannot agree. The Court refused to find that there was no substantial basis for this Court's conclusion as to the joint enterprise, and further held, disregarding joint enterprise and conceding complainant's business was all interstate, there was still liability. The concluding language of the Supreme Court was, 'It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.' "

Memphis Natural Gas Co. v. *McCanless,* 180 Tenn. —, 177 S. W. 2d. 843.

It is thus seen that the Supreme Court of Tennessee interpreted the opinion of this Court in *Memphis Natural Gas Company* v. *Beeler, supra,* as being clearly determinative of the present litigation. *The Supreme Court of Tennessee further specifically held that under the circumstances it was not necessary for them to pass upon the controversy between the parties as to whether any portion of the corporation's business in Tennessee was of a local or intrastate character.*

It was concluded that the same taxpayer was again denying his liability for the same tax which he had previously litigated unsuccessfully through the courts of Tennessee and the Supreme Court of the United States. The respondent regards petitioner's tax liability as having been plainly and unequivocally fixed by the previous decision of this Court.

II.

Stare Decisis—Obiter Dictum. A Case Is of Equal Authority Upon Each of Two Distinct and Sufficient Grounds Upon Which An Appellate Court Rests Its Affirmance of a Judgment, Although Only One of Those Grounds Was Considered in the Court Below.

In response to petitioner's contention that the second ground of this Court's decision in *Memphis Natural Gas Company* v. *Beeler, supra,* is mere dictum, we would point out the following authorities in which this Court has held precisely to the contrary—authorities in which the facts are analogous to those in the instant case. In *Union Pacific R. R. Co.* v. *Mason City & Ft. Dodge R. R. Co.*, 199 U. S. 159, 50 L. Ed. 134, this Court held:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum. Florida C. R. Co.* v. *Schutte,* 103 U. S. 118, 26 L. ed. 327, in which this court said (p. 143, L. ed. 336):
>
> " 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. *Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.*' " (Italics ours.)
>
> *Union Pacific R. R. Co.* v. *Mason City & Ft. Dodge R. R. Co.*, 199 U. S. at p. 166, 50 L. Ed. at p. 137.

In *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 72 L. Ed. 303, this Court said:

"Counsel for the petitioner here insist that this statement was not necessary to the decision because the conclusion in that case was clearly made to depend on the noninfringement of the patent and that the reference to sec 3477 could only be regarded as obiter dictum. It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than sec. 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority except by directly reversing the decision in that case on that point, which we do not wish to do."

Richmond Screw Anchor Co. v. *U. S.*, 275 U. S. at p. 340, 72 L. Ed. at p. 306.

In *United States* v. *Title Insurance & T. Co.*, 265 U. S. 472, 68 L. Ed. 1110, this Court said:

"Enough has been said to make it apparent that that case and this are so much alike that what was said and ruled in that should be equally applicable in this. But it is urged that what we have described as ruled there was obiter dictum, and should be disregarded, because the court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. *The premise of the contention is right, but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'* Union P. R. Co. v. Mason City & Ft. D. R. R. Co., 199 U. S. 160, 166, 50 L. ed. 134, 137, 26 Sup. Ct. Rep. 19; Florida C. R. Co. v. Schutte, 103 U. S. 118, 143, 26 L. Ed. 327, 336." (Italics ours.)

U. S. v. *Title Ins. & T. Co.*, 265 U. S. at pp. 485-486, 68 L. Ed. at p. 1114.

In *Florida Central R. Co.* v. *Schutte et al.*, 103 U. S. 118-145, 26 L. Ed. 327, this Court announced the rule which had been followed in its later cases, that:

> "Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."
>
> *Florida Central R. Co.* v. *Schutte, et al.*, 103 U. S. 118-145, 26 L. Ed. at p. 336.

The foregoing decisions of this Court definitely and completely support respondent's contention that even though this Court based its decision in *Memphis Natural Gas Company* v. *Beeler, supra*, upon two separate grounds, both of said grounds of decision are of equal dignity and neither can be lightly brushed aside as dictum.

Petitioner's insistence upon this point is particularly weak because this Court can look to the record in *Memphis Natural Gas Company* v. *Beeler, supra*, and readily find that the same question of interstate commerce was presented in the same manner as in the instant case, and, further, the same authorities and the same arguments as are contained in the present petition for certiorari were forcefully and assiduously pressed upon this Court. The point having been raised, briefed and argued before the Court, it was made the second ground of the Court's decision and was decided in plain and unmistakable language. The Court

then painstakingly cited some ten other cases in support of the holding.

This Court had before it in *Memphis Natural Gas Company* v. *Beeler, supra,* two determinative questions. The Court fully considered those questions and carefully decided both of them, not by a casual remark, sentence or paragraph, but by a clear decision upon each of the grounds which was thoroughly supported by the citation of many authorities. The State of Tennessee could not but act in accordance with this solemn judgment of the Court.

III.

Petitioner Has At All Times Maintained Its Commercial Domicile in Tennessee and Has Been Engaged Partially in Intrastate Commerce in Tennessee.

The Supreme Court of Tennessee, in its opinion in *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. ——, 177 S. W. 2d. at p. 846, stated as follows:

> "There is still quite a controversy between the complainant and the Commissioner as to whether any portion of complainant's business in Tennessee is of a local or intrastate character. *We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Company* v. *Beeler, supra.*" (Italics ours)
>
> *Memphis Natural Gas Co.* v. *McCanless,* 180 Tenn. ——, 177 S. W. 2d. at p. 846.

The respondent strongly urged upon the Supreme Court of Tennessee that a part of petitioner's business was intrastate in character, but, as above stated, the Supreme Court of Tennessee did not find it necessary to pass upon this question.

On account of the fact that petitioner is in effect attempting to re-try some of the identical issues which were before this Court in the previous litigation (*Memphis Natural Gas Company* v. *Beeler, supra*) it becomes necessary for respondent—with apologies to the Court—to re-state a very limited part of its position relative to petitioner's *intrastate* business which was relied upon before this Court in the previous litigation and which was also fully briefed and argued before the Supreme Court of Tennessee in the present litigation.

The Memphis Natural Gas Company was originally organized by some citizens of Memphis who felt it would be of advantage to the City of Memphis to buy gas in Louisiana and pipe it into Memphis, Tennessee (R. 154). During the entire time involved in this litigation the corporation has maintained its general offices in the Sterick Building at Memphis, Tennessee. All of its current banking business is done through local Memphis banks. All of its payrolls are made up in the Memphis office. All books of the Company are kept in Memphis. All directors' meetings are held at Memphis. Although it does business in Mississippi, Louisiana and Arkansas, the only operational office which is maintained is located at Memphis, Tennessee.

Although a Delaware corporation it maintains merely its corporate transfer office in that state, as required by the statutes of Delaware. The principal purpose of the organization of appellant corporation was to furnish gas to Memphis, Tennessee. All accounts payable and all operational accounts are handled in Memphis. All payments by customers are made monthly to the Memphis office. The president, vice-president, treasurer, assistant secretary-treasurer of the Company, all reside in Memphis. The active management of the business is conducted from Memphis. From 85% to 90% of petitioner's gross revenues are de-

rived from Tennessee sources and approximately 85% of its total gas is delivered to customers in Tennessee.

Rec. pp. 69, 58, 155, 156, 157, 170.

Without burdening this brief with a detailed recitation of the business activities of the petitioner in Tennessee, an examination of the record will disclose that a vast majority of all its business is conducted in Tennessee.

The basic reasoning of the respondent's position as to petitioner's commercial domicile in Tennessee has been well expressed by the Supreme Court of Minnesota (1943) in *Cargill, Inc.* v. *Spaeth, Commissioner of Taxation,* 215 Minn. 549, 10 N. W. 2d. 728, at p. 733, where that Court said:

> "Corporations are organized in some states in full recognition of the fact that they will depart therefrom to other states to establish their business homes. As a practical matter, the migration is no different from that of an individual. Legal fiction should be made to yield to reality. A corporation may make its actual, as distinguished from its technically legal, home in a state other than that of its incorporation. Where a corporation, organized under the laws of one state, transacts no business there and establishes its principal office in another, where it manages and directs its business, it acquires a commercial domicile there, in virtue of which it is subject to taxation there upon its intangibles, even though its business may extend into other states. For purposes of taxation, intangibles have a situs at the taxpayer's commercial domicile. Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 62 S. Ct. 857 86 L. Ed. 1090; First Bank Stock Corp. *v.* Minnesota, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228, affirming 197 Minn. 544, 267 N. W. 519, 269 N. W. 37; Wheeling Steel Corp. *v.* Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143. Because here Minnesota was the taxpayer's commercial domicile, it was taxable here upon the dividends received from its foreign subsidi-

aries, although they transacted no business here. See annotation, 102 A. L. R. 78."

Cargill, Inc. v. *Spaeth, Com'r. of Ta'n.*, 215 Minn. 549, 10 N. W. 2d. 728, at p. 733.

It is insisted by petitioner that it is only engaged in interstate transportation of gas and that any local or intrastate business which is carried on in Tennessee is carried on by the distributing companies, viz., Memphis Light, Gas & Water Division and the West Tennessee Gas Company. A close examination, however, of petitioner's activities in Tennessee shows that the corporation itself is engaged in intrastate business. It is particularly important, among other points, to note that petitioner sells gas to the Memphis Generating Company, *which is not a distributor of gas, but is on the contrary itself a consumer,* (Rec. p. 56.)

(Compare facts with *Southern Natural Gas Corporation* v. *State of Alabama,* 301 U. S. 148, 81 L. Ed. 970.)

The sale of this gas to a consumer or user—the Memphis Generating Company—is not only alleged in petitioner's original bill, but the contract between the two companies appears in the record and the transaction is freely admitted by petitioner's witnesses. Petitioner tries to distinguish its operations in Tennessee from the Southern Natural Gas Corporation case upon the legalistic and technical ground that in the Southern Natural Gas Corporation case the Court predicated tax liability upon the fact that short service lines were installed by the seller to deliver gas to the purchaser, whereas, in the instant case, it claims no such lines were installed. This Court declined to accept such a narrow view of the case, however, in *Illinois Natural Gas Company* v. *Central Illinois Public Service Commission,* 314 U. S. 498-510, 86 L. ed. 371-378, where Mr. Chief Justice Stone interprets the decision in the Natural Gas Corporation case thus:

"In Southern Natural Gas Corp. *v.* Alabama, 301 U. S. 148, 156, 157, 81 L. ed. 970, 975, 976, 57 S. Ct. 696, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

Ill. Nat. Gas Co. v. *Central Ill. Pub. Serv. Co.*, 314 U. S. 498-510, 86 L. ed. at p. 376.

The clear meaning of this interpretation is that it is the nature of the business carried on rather than any legalistic or technical detail which controls.

Respondent submits that not only is petitioner selling gas outright to a consumer in Tennessee which uses the gas for the purpose of manufacturing electricity and is thereby engaging in intrastate commerce, but a further examination of the record will reveal that petitioner has established "farm taps" in a number of instances, where gas is delivered to individual farmers (R. 53). It is true that this gas is billed and paid for in such instances through the Memphis Light, Gas & Water Division, or through the West Tennessee Gas Company, but this is obviously an effort to give such intrastate business the appearance of interstate commerce. Petitioner also delivers gas to a number of towns in Shelby County, Tennessee, outside of the City of Memphis, as well as to the municipal airport and to the Shelby County Penal Farm, which use such gas (R. 54-55).

This also is billed and paid for through the Memphis Light, Gas & Water Division, but, as in the case of the farm taps, it is apparently only an arrangement for handling in order to give an appearance of interstate commerce. Our point is that the fundamental facts show sales to consumers

and distributors alike and under decisions of this Court it is essentially an operation in intrastate commerce.

The furnishing of natural gas to consumers is intrastate commerce. The character of such business is not national, but is essentially local, and the business of a company doing such business is intrastate and is, therefore, not exempt from taxation by the State within which it is carried on. *Moore, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S., 298, 65 L. ed. 1027; also *East Ohio Gas Co.* v. *Texas Commission*, 283 U. S. 465, 75 L. ed. 1171; *Southern Natural Gas Co.* v. *Ala.*, 301 U. S. 148, 81 L. ed. 970; *Department of Public Utilities* v. *Ark.* (Law case from Supreme Court of Arkansas), 108 S. W. (2d) 586; *Interstate Natural Gas Co.* v. *Stone, Com'r.*, 103 F. (2d) 544, 307 U. S. 620, 83 L. ed. 1499. The analogy between the business of the Southern Natural Gas Company in Alabama, in its business of selling gas to consumers on demand, and that of the Memphis Natural Gas Company, in its business in Tennessee of selling gas to consumers in Tennessee on demand, is complete.

IV.

A State Is At Liberty to Levy a Nondiscriminatory Privilege Tax Upon Corporations Doing Business in a State, and There Is No Federal Requirement That a State Favor Interstate Commerce Over Intrastate Commerce.

The Tennessee excise and franchise taxes here involved accord all corporations that do business in Tennessee equal treatment and the taxes are in no sense a tax barrier. No discrimination is made in favor of intrastate commerce. The statutes tax all corporations doing business in Tennessee. The excise tax (Sec. 1316, Code of Tennessee) is measured by 3.75% of the net earnings of the corporation

for their next preceding fiscal or calendar year from business done within the State. A proper allocation formula is provided. On page 2 of the petition for certiorari in the excise tax case, the petitioner states: "We have no question about the fairness of the allocation formula used by respondent. If petitioner is liable for any excise taxes the amount assessed is equitable."

In the case of the Tennessee franchise tax, there is also an allocation formula provided, the fairness of which is not questioned, and petitioner is relying upon the same authorities to avoid both taxes. Petitioner has briefed both petitions jointly and apparently concedes that the decision of the excise tax liability controls its franchise tax liability.

We note that on page 12 of petitioner's brief the petitioner relies upon certain language of the Supreme Court of Tennessee in a companion case to the two cases here involved. (*Memphis Natural Gas Company* v. *McCanless*, 180 Tenn. —, 177 S. W. (2d) 841). That case involved the Tennessee *gross receipts tax statute and was decided against the State of Tennessee.*

The decision in the above cited gross receipts tax case by the Supreme Court of Tennessee is in effect highly inequitable, since it grants vastly preferential treatment to the petitioner as compared to domestic corporations engaged in business wholly within the State of Tennessee.

The State of Tennessee could not file a cross-petition for certiorari before this Court, for the reason that the gross receipts tax case was in reality decided upon the construction of the Tennessee statute. The Tennessee gross receipts tax statute, public Acts of Tennessee, 1937, Ch. 108, Art. 2, Sec. 2, Item G, contains highly restrictive language, which is as follows:

> "It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce *carried on*

wholly within this State and not a part of interstate commerce.'' (Italics ours.)

It is thus seen that by reason of the restrictive language in the State statute the practical result is that a domestic corporation engaged in the same business entirely within the State of Tennessee is required to pay approximately twice the amount of privilege taxes that have been charged against a foreign corporation engaged in both interstate and intrastate business—as in the case of the petitioner here.

This tax situation, as it now exists, penalizes the domestic corporation engaged wholly in business in Tennessee. By reason of the highly restrictive language in the Tennessee gross receipts tax statute, the Memphis Natural Gas Company has already been accorded highly preferential treatment in the matter of privilege taxes by the Supreme Court of Tennessee.

V.

Petitioner's Assignments of Error Before the Supreme Court of Tennessee Were Not Included in the Transcript Before This Court.

The rules of the Supreme Court of Tennessee (Sec. 14, 173 Tenn., pp. 873-874) require the filing of assignments of error. The petitioner did file his assignments of error before the Supreme Court of Tennessee, but obviously through oversight failed to include the same in his transcript of the record before this Court. This Court is left to some extent to surmise, from quotations of the opinion of the State Court, the Federal questions presented and the manner of their presentation. Under the decision of *Lynch* v. *New York, ex rel., Pierson,* 293 U. S. 52-55, 79

L. ed. 191, there may exist some question as to the jurisdiction of this Court upon the record in its present condition.

VI.

Conclusion.

It is inescapable that Tennessee in reality has furnished the opportunity to petitioner to have any net earnings whatever; it afforded the market; its government afforded the protection for this enterprise; the earnings came from Tennessee; the business competed with other Tennessee enterprises which paid their proportionate share of the cost of Tennessee government. To allow petitioner to avoid its just share of the tax burden would be to discriminate against other corporations doing business wholly within Tennessee. There is no obstacle to taxation of petitioner contained in the decisions of the Supreme Court of the United States construing the commerce clause.

To grant the petition for writs of certiorari would result in a gross injustice to the states in which petitioner does business. In addition to Tennessee, petitioner is also engaged in privilege tax litigation, or income tax litigation, with the states of Mississippi and Arkansas, in which it also does business (R. 214-215). If petitioner is successful in all such litigation with the states in which it does business, it is then relieved of the payment of any state privilege or income taxes *anywhere*.

The inevitable result is that other corporations engaged wholly in intrastate business bear the entire burden of these nondiscriminatory taxes. In the instant litigation the petitioner seeks to avoid this burden of state government, but readily accepts all of the benefits and protection provided

by the State of Tennessee. The petitions are without merit and should be denied.

Respectfully submitted,

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